A

T Ganeswaran lwn Suruhanjaya Polis Diraja Malaysia dan satu lagi

MAHKAMAH RAYUAN (PUTRAJAYA) — RAYUAN SIVIL NO W–01–28 TAHUN 1999

B ALAUDDIN HMP, ABDUL AZIZ HMR DAN RAUS SHARIF HMT

1 JULAI 2005

Undang-Undang Pentadbiran — Hak dan liabiliti pegawai awam — Prosiding disiplin di bawah Perintah Am, Bab D — Penurunan pangkat — Kegagalan memberi kepada yang dituduh
C *keterangan saksi dan rekod perkhidmatan — Sama ada penurunan pangkat melanggar rukun keadilan asasi*

Undang-Undang Pentadbiran — Rukun keadilan asasi — Keadilan prosedur — Prosiding disiplin pegawai awam — Kegagalan memberi kepada yang dituduh keterangan saksi dan rekod
D *perkhidmatan — Sama ada terjumlah kepada kegagalan keadilan asasi*

Perayu adalah bekas pegawai polis berpangkat PPP (Assistant Superintendent of Police) di dalam perkhidmatan Kerajaan Malaysia iaitu responden kedua. Perayu telah diturunkan pangkat kepada Inspektor atas alasan gagal mengambil tindakan terhadap satu Inspektor Azman yang telah menerima rasuah, maka
E itu perayu dikatakan telah bertindak secara tidak bertanggungjawab. Perayu memohon kepada Mahkamah Tinggi Kuala Lumpur bagi mendapat satu perintah deklarasi bahawa penurunan pangkat beliau adalah melanggar undang-undang, bertentangan Perlembagaan Persekutuan, tidak sah, batal dan tanpa apa-apa kuatkuasa. Perayu berhujah, antara lain bahawa: (1) perbuatan responden pertama
F ('suruhanjaya itu') di dalam perkara ini adalah bertentangan dengan art 135(2) Perlembagaan Persekutuan, kerana perayu tidak diberi peluang yang munasabah untuk didengar dan perbuatan seperti itu juga merupakan suatu pelanggaran rukun-rukun keadilan asasi dan kegagalan keadilan prosedur (procedural fairness); dan (2) respondent pertama dalam membuat keputusannya terhadap
G perayu, telah mengambilkira rekod perkhidmatan perayu dan dua pernyataan saksi yang tidak diberi salinannya kepada perayu dan maka itu perayu tidak dapat menjawab keterangan-keterangan ini dan mengakibatkan keputusan penurunan pangkat itu. Mahkamah Tinggi telah menolak saman perayu dan perayu merayu ke mahkamah ini.

H

Diputuskan, dengan majoriti menolak rayuan dengan kos:

(1) (oleh **Alaudin HMP**, **Raus Sharif H** bersetuju) Setelah diteliti kesemua langkah yang diambil pihak responden pertama sehingga tercapainya keputusan menurunkan pangkat perayu dari PPP kepada Inspektor
I Polis, didapati bahawa pihak responden pertama tidak mengabaikan tanggungjawab mereka mengikut Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980. Malah kesemua kehendak

Perintah-Perintah tersebut yang relevan telah dipatuhi sepenuhnya (lihat perenggan 26). Jadinya, alasan perayu bahawa prosiding yang dijalankan responden pertama itu bercanggah dengan art 135 (2) Perlembagaan Persekutuan dan rukun-rukun keadilan asasi dengan sendirinya gagal dan tidak dapat dipertahankan (lihat perenggan 29).

(2) (oleh **Alaudin HMP**, **Raus Sharif H** bersetuju) Berdasarkan pengakuan perayu sendiri yang telah mengaku kesalahannya didapati sukar untuk mempercayai dakwaan perayu yang menyatakan pertuduhan terhadapnya adalah tidak benar, palsu dan tidak berasas sama sekali (lihat perenggan 47).

(3) (oleh **Alaudin HMP**, **Raus Sharif H** bersetuju) Perayu tidak mencabar atau memplid di mana-mana bahawa suruhanjaya itu telah membuat keputusan berasaskan kepada rekod perkhidmatan. Justeru alasan ini tidak seharusnya dipertimbangkan (lihat perenggan 54). Sebaliknya, memandangkan penghargaan-penghargaan perayu sendiri telah diambilkira maka sudah semestinya tindakan tersebut akan memberi faedah dan manfaat kepada perayu (lihat perenggan 58).

(4) (oleh **Abdul Aziz HMR**) Kegagalan untuk memberikan rekod perkhidmatan kepada perayu tidak memprejudiskan beliau kerana keterangan yang diambil kira oleh Suruhanjaya tersebut daripada perkhidmatannya adalah pujian-pujian terhadap perayu (lihat perenggan 75).

(5) (oleh **Abdul Aziz JCA** bertentang) Perayu tidak menyedari adanya keterangan saksi yang telah diambil kira oleh suruhanjaya tersebut dan telah tidak diberikan peluang untuk membela dirinya terhadap keterangan tersebut (lihat perenggan 83). Memandangkan perayu tidak diberikan peluang untuk didengar berkaitan dengan dua keterangan saksi tersebut, penurunan pangkat beliau adalah tidak sah (lihat perenggan 89).

[**Bahasa Malaysia summary**

The appellant was an ex-police officer of the rank of PPP (Assistant Superintendent of Police) in service with the Government of Malaysia, the second respondent. The appellant had been demoted to the rank of Inspector due to failure to take action against one Inspector Azman who had received bribe/gratification, which had rendered the appellant to have acted irresponsibly. The appellant applied to the Kuala Lumpur High Court for a declaratory order that the demotion was illegal, unconstitutional, null and void and of no effect. The respondent argued *inter alia*, that: (1) the first respondent's action ('the commission') in this case was in contrary to art 135(2) of the Federal Constitution, for the reason that the appellant was deprived of a reasonable opportunity to be heard and that such action was also in contravention with the principles of natural justice and failure of procedural fairness; and (2) the first respondent, in deciding against the appellant, had taken into account the appellant's record of service and two witness statements, the copy of which

had not been made available to the appellant resulting in the appellant's inability to reply to the testimonies and ultimately cause the decision for demotion. The High Court had rejected the appellant's summons and the appellant appealed to this court.

Held, by majority dismissing the appeal with costs:

(1) (per **Alaudin FCJ**, **Raus Sharif J** concurring) After scrutinising all actions taken by the first respondent that had resulted in the demotion of the appellant from the rank of PPP to police Inspector, it was found that the first respondent had not neglected their duty in line with Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980. In fact, all relevant requirements of the Orders were complied with (see para 26). Therefore, the appellant's argument that the proceeding carried out by the first respondent was in contravention with art 135(2) of the Federal Constitution and the principles of natural justice has by itself failed and could not be maintained (see para 29).

(2) (per **Alaudin FCJ**, **Raus Sharif J** concurring) Based on the admission by the appellant who had admitted his offence it is therefore hard to believe the appellant's argument that the claim against him was untrue, false and of no basis (see para 47)

(3) (per **Alaudin FCJ**, **Raus Sharif J** concurring) The appellant had not challenged or plead where the commission had made any decision based on the record of service. Therefore, this argument should not be considered (see para 54). On the other hand, since all the appellant's awards were taken into consideration, it would have favoured and benefited the appellant (see para 58).

(4) (per **Abdul Aziz JCA**) The failure to make the appellant's record of service available to him the did not prejudice him because the evidence that what the Commission took into consideration from the record of service were the appellant's commendations (see para 75).

(5) (per **Abdul Aziz JCA** dissenting) The appellant was not aware of the witness statements which were considered by the Commission and was not afforded an opportunity to defend himself against them (see para 83). As the appellant was not accorded the right to be heard as regards the two witness statements, his reduction in rank was invalid (see para 89).]

Nota-nota

Untuk kes mengenai keadilan prosedur, lihat 1 *Mallal's Digest* (4th Ed, 2002 Reissue) perenggan 758–759.

Untuk kes mengenai prosiding disiplin di bawah Perintah Am, Bab D, lihat 1 *Mallal's Digest* (4th Ed, 2002 Reissue) perenggan 638.

Kes-kes yang dirujuk

Abdul Rauh v Attorney-General [1983] 1 MLJ 10 (dirujuk)
Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor [2002] 2 MLJ 131 (dirujuk)
Chief Constable of North Wales Police v Evans [1982] 3 All ER 141 (dirujuk)
Deputy Chief Police Officer, Perak v Ramesh a/l Thangaraju [2001] 1 MLJ 161 (dirujuk)
Halimatussaadiah v Public Service Commission [1992] 1 MLJ 513 (dirujuk)
Harbhajan Singh v Suruhanjaya Pasukan Polis Malaysia [2002] 3 MLJ 714 (dirujuk)
Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal [2001] 2 MLJ 417 (dirujuk)
Raja Abdul Malek Muzaffar Shah bin Raja Shahruzaman v Setiausaha Suruhanjaya Pasukan Polis [1995] 1 MLJ 308 (dirujuk)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 (dirujuk)
S Nanjundeswar v State of Mysore AIR 1960 SC 159 (refd)
Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor [1990] 3 MLJ 354 (dirujuk)

Undang-undang yang dirujuk

Akta Polis 1967
Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980, per 24, 25, 26(2), (4)
Perlembagaan Persekutuan art 135(2), 140

Rayuan dari: Guaman Sivil No S5-21-115 tahun 1995 (Mahkamah Tinggi, Kuala Lumpur)

Christopher Fernando (Marisa Regina bersamanya) (Aris Rizal Christopher Fernando & Co) untuk perayu.
Pretam Singh a/l Darshan Singh (Peguam Kanan Persekutuan) (Jabatan Peguam Negara) untuk responden-responden pertama dan kedua.

Alauddin HMP (memberi penghakiman majoriti):

[1] Rayuan di hadapan mahkamah ini ialah terhadap keputusan Mahkamah Tinggi Kuala Lumpur bertarikh 31 Julai 1996 yang menolak saman perayu bagi mendapat satu perintah deklarasi bahawa penurunan pangkat beliau di dalam Perkhidmatan Polis Diraja Malaysia ('PDRM') adalah melanggar undang-undang, bertentangan Perlembagaan Persekutuan, tidak sah, batal dan tanpa apa-apa kuatkuasa dan beliau masih lagi seorang penolong penguasa polis ('PPP') di dalam PDRM dan berhak untuk menerima kesemua gaji dan keuntungan dari membuat kerja dan manfaat-manfaat sebagai PPP.

[2] Di dalam permohonan yang sama perayu juga memohon supaya satu 'enquiry' diadakan untuk menentukan gaji, emolumen dan lain-lain manfaat yang berhak diterimanya. Beliau juga menuntut bayaran gantirugi.

LATARBELAKANG KES

[3] Perayu pada satu masa adalah seorang pegawai polis berpangkat PPP di dalam PDRM dan di dalam perkhidmatan Kerajaan Malaysia iaitu responden kedua.

[4] Melalui sepucuk surat bertarikh 15 Januari 1992 responden pertama telah memberitahu perayu mengenai niatnya untuk menurunkan pangkatnya dalam perkhidmatan PDRM dan telah mengarahkan perayu untuk menunjuk sebab mengapa beliau sepatutnya tidak diturunkan pangkat, menurut perintah 26 daripada Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980 ('Perintah-Perintah tersebut') mengenai satu tuduhan yang dibawa terhadapnya oleh responden pertama seperti berikut:

> Bahawa kamu, seorang pegawai awam, iaitu penolong penguasa polis, di dalam Pasukan Polis Diraja Malaysia dan ketika itu berkhidmat di Cawangan Jenayah, Bukit Aman, Kuala Lumpur, telah didapati tidak bertanggungjawab kerana pada 28 Disember 1987 kira-kira pukul 10pg di Ibu Pejabat Daerah Polis Seremban, dalam Negeri Sembilan Darul Khusus, kamu telah membiarkan dan tidak mengambil sebarang tindakan terhadap Inspektor Mohd Azman bin Abd Manap kerana melakukan kesalahan menerima rasuah wang tunai RM2,000 daripada Jaw Lak Chai bagi membebaskan isterinya bernama Yong Low Fong (P) yang ditangkap oleh Inspektor Mohd Azman bin Abd Manap pada 24 Disember 1987 di premis No 1726, Jalan Rasah, Seremban, kerana disyaki menjalankan judi ekor haram, oleh yang demikian kamu telah melakukan kesalahan di bawah Perintah Am 4(2)(g), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980.

[5] Secara ringkasnya, fakta-fakta yang menyebabkan pihak responden pertama bertindak untuk mengambil tindakan tatatertib terhadapnya dengan mengemukakan pertuduhan seperti tersebut di atas adalah seperti berikut:

> Sebagai seorang anggota polis berpangkat PPP, Perayu telah berkhidmat di Seremban lebih kurang 13 tahun. Pada September, 1987 beliau ditukarkan ke Kuala Lumpur tetapi masih menetap di Seremban. Pada 27 Ogos 1987 seorang kawan perayu bernama Jaw Lak Chai ('Jaw') datang berjumpa dengannya dan mengadu bahawa terdapat seorang inspektor polis sedang mengganggunya dengan meminta wang dari beliau berhubung satu kegiatan loteri haram yang dijalankan oleh isterinya. Jaw memberitahu perayu bahawa beliau telah memberi RM3,000 kepada inspektor ini tetapi beliau (Inspektor) mendesak Jaw memberi lebih dari itu. Dengan hanya berpandu kepada nombor kereta yang diberikan oleh Jaw, perayu mendapat tahu bahawa Inspektor yang dimaksudkan Jaw ialah Inspektor Azman.
>
> Dengan maklumat yang diperolehi, perayu menasihat Jaw membuat laporan polis atau laporkan perkara itu kepada pihak Badan Pencegah Rasuah. Jaw enggan berbuat demikian kerana takut masalah akan timbul kemudian hari. Sebaliknya perayu dan Jaw pergi dan bertemu Inspektor Azman di pejabatnya di Seremban di mana Inspektor Azman memohon

maaf dari Jaw mengenai tindakannya dan merayu kepada Perayu supaya perkara itu tidak dijadikan satu isu lagi. Inspektor Azman kemudian kembalikan wang RM2,000 kepada Jaw dengan disaksikan perayu. Perayu seterusnya menasihati Inspektor Azman supaya tidak terlibat lagi dengan aktiviti rasuah kerana beliau masih muda.

Lebih kurang dua atau tiga bulan kemudian perayu dapat berita bahawa Inspektor Azman masih memeras wang dari ramai orang. Perayu kemudian menyampaikan maklumat ini kepada kawannya di pejabat Badan Pencegah Rasuah. Enam bulan kemudian Inspektor Azman telah ditangkap oleh Badan Pencegah Rasuah dan didakwa atas beberapa kesalahan rasuah yang lain.

Semasa menunggu perbicaraan kes Inspektor Azman pihak berkuasa tatatertib PDRM membuat penyiasatan teliti berhubung aktiviti-aktiviti beliau. Di sinilah mereka mendapat tahu tentang kejadian seperti yang tersebut di atas di mana perayu terlibat. Justeru itu pihak responden pertama telah mengeluarkan surat tunjuk sebab kepada perayu.

[6] Menerusi representasi bertulisnya perayu telah mengemukakan penjelasan secara terperinci dan berterus terang mengenai kejadian tersebut. Beliau seterusnya menyatakan yang beliau cuba melaporkan perkara itu kepada Ketua Polis Daerah Seremban melalui telefon tetapi gagal. Di kesempatan yang lain beliau cuba bertemu dengan Timbalan Ketua Jabatan Siasatan Jenayah Daerah Seremban bagi tujuan yang sama tetapi tidak dapat berbuat demikian disebabkan Inspektor Azman sentiasa berada di situ. Selepas itu beliau tidak lagi menghubungi sesiapa melainkan kawannya di Badan Pencegah Rasuah.

[7] Menerusi representasi itu juga, perayu menyatakan yang beliau hanya dapat menjawab tuduhan ke atasnya secara sebahagian sahaja dan tidak lengkap disebabkan beliau tidak mempunyai maklumat yang relevan dan mustahak.

[8] Perayu juga mendakwa bahawa beliau tidak diberi apa-apa kemudahan sama ada secara membekalkannya dengan kertas-kertas siasatan atau pengaduan ataupun memberi semua maklumat yang relevan bagi membolehkannya membuat representasi dengan lengkap.

[9] Perayu juga mendakwa bahawa tuduhan ke atasnya adalah palsu, samar dan sama sekali tanpa asas.

[10] Namun begitu, responden pertama berpendapat bahawa perayu telah gagal membebaskan (exculpate) dirinya dari tuduhan tersebut dengan memuaskan dan melalui suratnya bertarikh 11 September 1992, responden pertama telah memberitahu perayu bahawa beliau dikenakan hukuman turun pangkat kepada Inspektor Polis.

[11] Pada 1 Julai 1995 perayu telah meletak jawatan secara pilihan (optional).

[12] Pada 26 Ogos 1995, perayu telah memfailkan saman terhadap responden-responden.

[13] Tuntutan perayu di dalam samannya didasarkan kepada alasan-alasan berikut:

(a) Perbuatan responden pertama di dalam perkara ini adalah bertentangan dengan art 135(2) Perlembagaan Persekutuan, kerana perayu tidak diberi peluang yang munasabah untuk didengar dan perbuatan seperti itu juga merupakan suatu pelanggaran rukun-rukun keadilan asasi.

(b) Pihak responden pertama gagal untuk mengambil berat fakta-fakta yang relevan dan keadaan yang menyebelahi pihak perayu yang mana fakta-fakta dan keadaan tersebut pasti dapat membebaskan perayu.

(c) Responden pertama bertindak atas maklumat yang palsu dan tidak tepat.

(d) Perayu telah dihalang untuk menggunakan kemudahan-kemudahan untuk memberi satu jawapan yang secukupnya.

[14] Pihak responden pertama telah menafikan kesemua dakwaan-dakwaan perayu dan seterusnya mempertahankan keputusan mereka dengan alasan mereka telah mematuhi ke semua kehendak-kehendak Perintah-Perintah tersebut yang mana relevan. Mereka juga menekankan bahawa tindakan serta keputusan mereka terhadap perayu tidak menyalahi mana-mana peruntukan Perlembagaan Persekutuan atau rukun-rukun keadilan asasi.

[15] Setelah mempertimbangkan keseluruhan keterangan-keterangan yang terdapat di dalam kes ini dan juga alasan-alasan yang dikemukakan perayu seperti yang tersebut di atas Yang Arif Hakim berpendapat tidak ada sebarang kesilapan atau kecacatan di pihak responden pertama mengenai tatacara yang dipakai dalam pencapaian keputusan mereka. Yang Arif Hakim berpuashati bahawa kesemua kehendak-kehendak Perintah-Perintah tersebut yang relevan telah dipatuhi oleh responden pertama. Atas alasan-alasan tersebut Yang Arif Hakim menolak saman perayu dengan kos.

ALASAN-ALASAN RAYUAN

[16] Di hadapan mahkamah ini peguam bijaksana bagi pihak perayu mempertikaikan keputusan Yang Arif Hakim itu atas alasan-alasan berikut:

(a) Yang Arif Hakim tersalah dari segi undang-undang dan fakta apabila beliau menolak tuntutan perayu, walaupun ianya jelas bahawa prosiding yang berakhir dengan penurunan pangkat perayu adalah bercanggah dengan art 135(2) Perlembagaan Persekutuan dan rukun-rukun keadilan asasi.

(b) Yang Arif Hakim telah tersalah dari segi undang-undang dan fakta apabila gagal berpegang kepada hakikat bahawa berlakunya pelanggaran per 24, 25 dan 26 Perintah-Perintah tersebut.

(c) Yang Arif Hakim telah tersalah dari segi undang-undang dan fakta dengan tidak mengambil kira bahawa prosiding di dalam kes ini dimulakan oleh pihak yang tidak diberikuasa, bercanggahan dengan proviso undang-undang yang mengakibatkan prosiding di dalam kes ini tidak sah dan terbatal.

(d) Yang Arif Hakim telah tersalah dari segi undang-undang dan fakta dengan tidak menimbangkan bahawa terdapat unsur-unsur 'mala fide' (niat jahat) mengenai keputusan penurunan pangkat perayu.

(e) Yang Arif Hakim telah tersalah dari segi undang-undang dan fakta dengan berpegang kepada pendapat bahawa tidak terdapat sebarang perkara yang tidak kena mengenai tatacara terhadap perayu, apabila tiada sebarang dokumen yang telah dihantar kepada responden pertama yang telah diambil kira oleh mereka, telah diberikan kepada perayu untuk menyediakan representasi beliau.

(f) Yang Arif Hakim telah tersalah dari segi undang-undang dan fakta dengan berpegang kepada pendapat bahawa satu permohonan patut dibuat oleh perayu untuk mendapatkan semua dokumen yang berkaitan dengan pertuduhan terhadapnya bagi membolehkan nya membela diri.

(g) Yang Arif Hakim telah tersilap dari segi undang-unang dan fakta dengan tidak membuat satu keputusan berpihak kepada perayu atas isu bahawa perayu tidak didapati bersalah atas mana-mana pertuduhan yang dikenakan ke atasnya.

(h) Yang Arif Hakim telah tersalah dari segi undang-undang dan fakta dengan tidak secara tepat dan betul menggunakan proviso-proviso art 135(2) Perlembagaan Persekutuan dan rukun-rukun keadilan asasi termasuk proviso-proviso Bab D, Perintah-Perintah tersebut terhadap keseluruhan fakta dan keadaan kes ini.

(i) Yang Arif Hakim telah tidak mengikuti prinsip 'stare decisis' iaitu kes Mahkamah Persekutuan *Shamsiah bte Ahmad v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 yang mana menyatakan bahawa jika responden-responden mengambil kira rekod perkhidmatan perayu, beliau mesti diberi peluang untuk membuat representasi atas pengambilan kira rekod tersebut sebelum keputusan untuk menurunkan pangkat perayu diambil.

(j) Keputusan Yang Arif Hakim adalah salah jika dibandingkan dengan keterangan saksi-saksi dan keterangan dokumentar.

PENDAPAT MAHKAMAH

[17] Sebelum mahkamah ini mempertimbangkan alasan-alasan rayuan yang dikemukakan peguam perayu kami berpendapat adalah lebih sesuai jika dinyatakan di sini mengenai prinsip-prinsip yang digunapakai oleh mahkamah-mahkamah dalam pengendalian kes-kes 'judicial review'.

[18] Mengenai perkara ini ingin kami merujuk kepada keputusan House of Lords di dalam kes *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141 yang menyatakan:

> Judicial review is not an appeal from a decision but a review of the manner in which the decision was made, and, therefore the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable.
>
> Judicial review is concerned, not with the decision, but with the decision — making process. Unless the restriction on the power of the court is observed, the court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping power.

[19] Menyentuh soal yang sama di dalam kes *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487, Edgar Joseph Jr J (beliau ketika itu) di dalam penghakimannya di ms 488 menyatakan:

> I would at the outset say that in considering these applications I have kept in the forefront of my mind the basic principles to be distilled from a number of cases upon which courts will review decisions of public authorities and inferior tribunals.
>
> The basic principles may be stated thus:
>
> (1) judicial review applies to any body of persons having legal authority derived from public law to determine questions affecting the rights of subjects whether that right is derived from statute or from the common law;
>
> (2) the High Court is not a Court of Appeal from the body under review;
>
> (3) the High Court limits itself to determining whether the public authority or inferior tribunal has acted lawfully, rationally and with due regard to proper procedures;
>
> (4) the court will not substitute its judgment or discretion for the judgment or discretion of the body under review;
>
> (5) facts determined by the body under review are rarely open to review in the High Court;
>
> (6) the High Court will intervene unless there is express statutory direction to the contrary;

(7) if there is an established appeal procedure from the decision of the body under review the court usually prefers this course to be followed;

(8) only activities of a public nature can be the subject of judicial review.

The cases from which I have distilled the above principles are: *Associated Provincial Picture Houses v Wednesbury Corporation*, *Ridge v Baldwin*, *Padfield v Minister of Agriculture, Fisheries & Food*, *Anisminic v Foreign Compensation Commission*, *Secretary of State for Education & Science v Tameside BC*, *Chief Constable of the North Wales Police v Evans, O'Reilly v Mackman*, *Law v National Greyhound Racing Club Ltd, Square Meals Frozen Foods Ltd v Dunstable Corporation*, *R v Crown Court at Ipswich*, *ex p Baldwin and Council of Civil Service Unions v Minister for the Civil Service*.

[20] Sekarang tibalah masanya bagi kami mempertimbangkan alasan-alasan rayuan satu demi satu dan memeriksa dan meneliti sama ada keputusan yang dicapai oleh Yang Arif Hakim itu mengikut lunas-lunas atau prinsip-prinsip yang digariskan di atas tadi.

ALASAN-ALASAN DI PERENGGAN (A) DAN (H)

[21] Perayu menyatakan bahawa prosiding yang dijalankan responden pertama yang berakhir dengan penurunan pangkat perayu dari PPP kepada Inspektor Polis adalah bercanggah dengan art 135(2) Perlembagaan Persekutuan dan rukun-rukun keadilan asasi. Yang Arif Hakim tersalah dari segi undang-undang dan fakta apabila menolak tuntutan perayu.

[22] Bagi mempertimbangkan alasan-alasan ini perlu kita lihat dan kaji langkah-langkah yang telah diambil oleh responden pertama satu persatu. Pertama, surat tunjuk sebab bertarikh 15 November 1992 dihantar mengikut per 26(2) Perintah-Perintah tersebut yang menyatakan:

The appropriate disciplinary authority shall, after considering all the available information in its possession that there is a *prima-facie* case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the legal department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself.

[23] Kedua, perayu telah mengemukakan representasinya secara bertulis sebanyak tujuh muka surat (bertaip) yang mengandungi alasan-alasan secara terperinci bagi tujuan membebaskan dirinya daripada pertuduhan tersebut. Representasi tersebut juga dibuat mengikut kehendak per 26(2) Perintah-Perintah tersebut.

[24] Ketiga, setelah mempertimbangkan representasi perayu, responden pertama berpendapat bahawa beliau telah gagal membebaskan dirinya dari

pertuduhan tersebut dan seterusnya pada 11 September 1992 responden pertama membuat keputusan menurunkan pangkat perayu dari PPP kepada Inspektor Polis.

[25] Tindakan responden pertama ini adalah mengikut kehendak per 26(4) Perintah-Perintah tersebut yang berbunyi:

> If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate disciplinary authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

[26] Setelah diteliti kesemua langkah-langkah yang diambil pihak responden pertama sehingga tercapainya keputusan menurunkan pangkat perayu dari PPP kepada Inspektor Polis kami bersependapat dengan keputusan Yang Arif Hakim bahawa pihak responden pertama tidak mengabaikan tanggungjawab mereka mengikut Perintah-Perintah tersebut. Malah kesemua kehendak-kehendak Perintah-Perintah tersebut yang relevan telah dipatuhi sepenuhnya.

[27] Bagi menjawab dakwaan perayu bahawa prosiding tersebut bercanggah dengan art 135(2) Perlembagaan Persekutuan dan rukun-rukun keadilan asasi kami ingin merujuk kepada keputusan Mahkamah Persekutuan di dalam kes *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang v Utra Badi a/l K Perumal* [2001] 2 MLJ 417.

[28] Di dalam kes tersebut Mahkamah Persekutuan berhadapan dengan masalah yang sama menyentuh Perintah-Perintah tersebut. Mahkamah itu telah merujuk kepada beberapa nas mengenai perkara yang sama dan di ms 440 dalam penghakimannya menyatakan:

> Taking all the above into considerations, we are of the view that the general orders, in detailing the procedures therein, have sufficiently complied with art 135(2) of the Federal Constitution and, in the process, are in accord with the concept of natural justice and procedural fairness.

[29] Jadinya, alasan perayu bahawa prosiding yang dijalankan responden pertama itu bercanggah dengan art 135 (2) Perlembagaan Persekutuan dan rukun-rukun keadilan asasi dengan sendirinya gagal dan tidak dapat dipertahankan.

ALASAN DI PERENGGAN (B)

[30] Mengikut alasan ini perayu mendakwa bahawa berlaku pelanggaran per 24, 25 dan 26 Perintah-Perintah tersebut semasa responden pertama menjalankan prosiding tersebut terhadapnya. Yang Arif Hakim dikatakan tersalah dari segi undang-undang dan fakta apabila tidak mengambilkira pelanggaran yang dimaksudkan di atas.

[31] Pada pendapat kami perkara ini tidak sepatutnya diberi pertimbangan atas alasan bahawa perayu tidak pernah mencabar atau memplid di mana-

mana pun bahawa responden pertama tidak mematuhi per 24, 25 dan 26 Perintah-Perintah tersebut. Jika alasan ini diberi pertimbangan oleh kami berkemungkinan besar ianya akan menimbulkan prejudis kepada pihak responden pertama.

ALASAN DI PERENGGAN (C)

[32] Dakwaan perayu di bawah alasan ini ialah Yang Arif Hakim tersalah dari segi undang-undang dan fakta kerana tidak mengambilkira bahawa prosiding terhadap perayu telah dimulakan oleh pihak yang tidak diberikuasa. Oleh itu ianya bercanggah dengan proviso undang-undang dan seterusnya mengakibatkan ianya tidak sah dan terbatal.

[33] Setelah dirujuk kepada rekod rayuan kami dapati bahawa prosiding terhadap perayu dimulakan oleh Suruhanjaya Polis Diraja Malaysia (responden pertama) iaitu satu pihak yang diberi kuasa di bawah art 140 Perlembagaan Persekutuan. Kami berpendapat alasan ini tidak berasas langsung.

ALASAN DI PERENGGAN (D)

[34] Perayu mendakwa bahawa terdapat unsur-unsur '*mala fide*' di dalam prosiding terhadap beliau. Malangnya perkara ini tidak pernah diplidkan dimana-mana pun atau ditimbulkan dalam keterangan Perayu. Justeru kami berpendapat alasan ini juga tidak harus dipertimbangkan kerana ianya akan menimbulkan prejudis terhadap responden pertama.

ALASAN-ALASAN DI PERENGGAN (E) DAN (F)

[35] Di bawah alasan-alasan ini perayu mendakwa beliau tidak diberi apa-apa kemudahan (dokumen-dokumen) bagi membolehkan beliau menjawab pertuduhan tersebut.

[36] Pertama, setelah disemak rekod rayuan kami dapati bahawa perayu tidak pernah pada bila-bila masa pun memohon bagi mendapatkan dokumen-dokumen tersebut.

[37] Adalah menjadi tanggungjawab responden pertama membekalkan perayu dengan dokumen-dokumen berkenaan sekiranya terdapat permohonan dari pihak perayu tetapi tidak sebaliknya (lihat *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* 1 MLJ 487 dan *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzaman v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308).

[38] Adalah jelas dari representasi bertulisnya bahawa perayu mempunyai maklumat yang lengkap dan mencukupi bagi beliau menjawab pertuduhan terhadapnya.

[39] Fakta-fakta yang telah dikemukakan perayu di dalam mahkamah dan juga yang terkandung di dalam representasinya adalah sama seperti yang terkandung di dalam pertuduhan tersebut. Perayu sebenarnya tahu mengenai

pertuduhan tersebut dan telah memberi jawapan dengan tepat dan terperinci. Malangnya beliau gagal meyakinkan pihak responden pertama yang beliau bebas dari tuduhan tersebut.

[40] Di ms 6 rekod rayuan sampingan ('RRS') perayu di dalam keterangannya di mahkamah menyatakan:

> I took Jaw to see Azman in his office. Azman apologised to Jaw and pleaded to him not to make any further issue of this incident and he also returned in front of me RM3,000 he had taken from Jaw.

[41] Di ms 10 RRS semasa di soal balas perayu menyatakan:

> I agree that the gist of this show cause letter is that I did not take action against Azman after Azman had taken bribery of RM2,000.

[42] Di dalam representasinya di ms 29 rekod rayuan perayu menyatakan:

> Dalam pertemuan tersebut Inspektor Azman telah meminta maaf kepada En Jaw Lak Chai dan telah mengembalikan wang sebanyak RM2,000 yang telah diambilnya dari En Jaw Lak Chai.

[43] Seterusnya di ms 30 rekod rayuan perayu menyatakan:

> Inspektor Azman telahpun terima rasuah itu tiga atau empat hari sebelum tarikh tersebut. Pada tarikh dan masa yang dimaksudkan Inspektor Azman hanya telah memulangkan wang RM2,000 kepada En Jaw Lak Chai.

[44] Dan seterusnya di ms 31:

> Saya telah menasihati Inspektor Azman supaya tidak mengulangi lagi perlakuannya menerima rasuah.

[45] Dan di ms 33:

> Saya mengaku walaupun saya telah bertindak seperti di atas, saya telah gagal membuat suatu laporan rasmi kepada pihak Polis.

[46] Berlainan pula dengan catatan di dalam 'Surat Penghargaan' perayu di ms 36 yang berbunyi;

> Semasa menjalankan pendakwaan kes-kes kesalahan jenayah, Encik telah banyak berjaya mensabitkan kesalahan-kesalahan dengan cemerlang walaupun berhadapan dengan peguambela-peguambela yang berkaliber, terkenal dan berpengalaman.

[47] Berdasarkan petikan-petikan di atas di mana perayu sendiri telah mengaku kesalahannya kami dapati sukar untuk mempercayai dakwaan perayu yang menyatakan pertuduhan terhadapnya adalah tidak benar, palsu dan tidak berasas sama sekali.

[48] Malah, kami berpendapat bahawa responden pertama telah mematuhi kesemua kehendak-kehendak Perintah-Perintah tersebut dalam mencapai keputusannya.

[49] Kami fikir adalah bertepatan ketika ini jika dirujuk kepada komen yang dibuat oleh Mahkamah Rayuan di dalam kes *Harbhajan Singh v Suruhanjaya Pasukan Polis Malaysia* [2002] 3 MLJ 714 yang menyatakan di ms 717:

> We would add that, in dealing with tribunals like the Police Commission, we should also guard ourselves from turning them into a court of law trying a criminal case, which they were not, and was never intended to be.

ALASAN DI PERENGGAN (G)

[50] Di bawah alasan ini perayu mendakwa bahawa beliau tidak didapati bersalah atas pertuduhan yang dikenakan ke atasnya. Oleh yang demikian Yang Arif Hakim telah tersilap dari segi undang-undang dan fakta kerana tidak membuat satu keputusan yang berpihak kepadanya.

[51] Bagi mempertimbangkan alasan ini ingin kami nyatakan bahawa mengikut undang-undang perayu tidak perlu didapati bersalah. Yang perlu dipertimbangkan oleh responden pertama ialah sama ada representasi yang dikemukakan oleh perayu itu dapat membebaskan (exculpate) dirinya dari tuduhan terhadapnya dengan memuaskan. Sekiranya representasi perayu tidak dapat berbuat demikian terhadap beliau maka responden pertama berhak menjatuhkan hukuman serta-merta.

[52] Di dalam kes *Halimatussaadiah v Public Service Commission* [1992] 1 MLJ 513, Eusoff Chin J ada menyatakan demikian:

> As regards the issue of 'finding of guilt' of the plaintiff before the PSC imposed the punishment of dismissal, I think it is perfectly clear that order 26(4) of the GO'D' does not require the PSC to make such finding. What the PSC is required to decide is whether the explanation given by the plaintiff, had exculpated the plaintiff to the satisfaction of the PSC.

[53] Kami berpendapat bahawa alasan ini juga tidak berasas dan dengan sendirinya gagal.

ALASAN DI PERENGGAN (I)

[54] Seperti alasan di perenggan (b) kami juga berpendapat bahawa perayu tidak mencabar atau memplid di mana-mana bahawa responden pertama telah membuat keputusan berasaskan kepada rekod perkhidmatan. Justeru alasan ini tidak seharusnya dipertimbangkan.

[55] Namun demikian apa yang sebenarnya berlaku ialah bukan kesemua rekod perkhidmatan perayu diambil kira oleh responden pertama. Mengikut keterangannya (di ms 22 RRS) DW1, Awang Din bin Hussain, Penolong Setiausaha SPP menyatakan:

> Berdasarkan memo SPP, SPP ambil kiraan perkhidmatan plaintiff penghargaannya sebelum buat keputusan.

A **[56]** Oleh kerana hanya 'penghargaannya' sahaja diambilkira oleh responden pertama maka pada hemat kami perayu tidak boleh mendakwa beliau diprejudiskan. Sebaliknya perayu sendiri merujuk kepada 'penghargaannya' di dalam representasi beliau seperti yang tercatat di perenggan 12 ms 33, rekod rayuan di mana beliau menyatakan selama 25 tahun perkhidmatan beliau
B kelakuan dan mutu kerjanya adalah cemerlang.

[57] Perayu juga menyebut 'penghargaan-penghargaan' yang telah diterimanya serta mengemukakan salinan surat-surat penghargaan tersebut dalam representasinya.

C **[58]** Memandangkan penghargaan-penghargaannya telah di ambilkira maka sudah semestinya tindakan tersebut akan memberi faedah dan manfaat kepada perayu. Tidak seperti keadaannya di dalam kes *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 354 di mana dinyatakan di ms 368:

D

> The record of service as far as the disciplinary action before the first respondent was concerned contained extraneous matters, detrimental to the appellant's case.

[59] Begitu juga dengan keadaannya di dalam kes *S Nanjundeswar v State of Mysore* AIR 1960 SC 159 di mana dinyatakan di ms 162:

E

> It was pointed out to us that in making the order of punishment, the Government has taken into consideration the previous conduct of the Sub-Inspector and has observed in its order that the previous conduct of the Sub-Inspector was not above-board.

F **[60]** Kami dapati alasan ini juga tidak berasas dan gagal dijustifikasikan oleh Perayu.

ALASAN DI PERENGGAN (j)

G **[61]** Alasan yang terakhir ini menyatakan keputusan Yang Arif Hakim adalah salah jika dibandingkan dengan keterangan saksi-saksi dan keterangan dokumentar.

[62] Setelah kami semak dan mempertimbangkan dengan teliti semua dokumen-dokumen dan keterangan-keterangan yang terdapat di dalam rekod
H rayuan dan RRS kami berpuashati bahawa Yang Arif Hakim telah memberi pertimbangan sewajarnya dan mengambilkira semua garispanduan dan aspek perundangan yang ditetapkan mengenai 'judicial review' dan keputusannya adalah bertepatan dengan keterangan-keterangan saksi dan keterangan-keterangan dokumentar yang berada di hadapan beliau.

I

[63] Berdasarkan alasan-alasan yang telah kami jelaskan di atas maka kami secara majoriti bersetuju bahawa rayuan ini patut ditolak dengan kos.

[64] Rakan bijaksana saya Raus bin Sharif, HMT yang sama-sama mendengar rayuan ini telah berpeluang meneliti penghakiman ini dan bersetuju dengan alasan-alasannya. Rakan bijaksana kami Abdul Aziz Mohamad, HMR telah menulis penghakiman bertentangan.

Abdul Aziz HMR (memberi penghakiman bertentangan):

[65] Nearly all that we know about this case come from the appellant, through his written representation to the Police Force Commission ('the Commission'), who are the first respondent, and through the evidence in the High Court of himself and his witness, Jaw Lak Chai ('Jaw'). The respondents' sole witness was an assistant secretary to the Commission who had not yet begun service with the Commission when they decided to reduce the appellant's rank and who knew about the case only from the minutes of the meeting of the Commission at which they made the decision and presumably from other documents in the relevant file.

[66] The appellant joined the Police Force on 1 March 1967 as a Probationary Inspector. In 1983 he was promoted to the rank of Assistant Superintendent of Police. He had been serving for 13 years in Seremban, where he lived, before he was transferred to the Federal Police Headquarters at Bukit Aman in September 1987. After his transfer he continued to live in Seremban. He was living there when he was on leave from 25 December 1987 until 1 January 1988.

[67] The events that were to land him in trouble with the Commission were related in his written representation to the Commission. Essentially, as related there, what happened was as follows. On 27 December 1987 at about 8pm, when he was on leave and resting at his home in Seremban, Jaw came and informed him that three or four days ago a police Inspector had arrested his wife on suspicion of running illegal gambling activities and had demanded RM5,000 to settle the matter. Jaw had paid RM2,000 but the Inspector had kept asking for RM3,000 more. Jaw did not know the Inspector's name but only the number of his motor car, which he gave the appellant. The appellant at first suspected that it was someone impersonating a police officer. Next day, 28 December 1987, the appellant ascertained from the Seremban District Police Headquarters that the number belonged to the motor car of one Inspector Azman, who had recently been transferred to Seremban as an investigation officer and whom the appellant had not known. When Jaw came again to see the appellant on the morning of that day, the appellant suggested that he either make a report of the matter to the Anti Corruption Agency ('ACA') or that the appellant take him to the Seremban District Police Chief to make a report. Jaw, however, was scared of the repercussions on him should he make a formal report and begged the appellant not to take the matter further, saying that all he wanted was that Inspector Azman would cease harassing him. So the appellant, taking Jaw with him, went to see Inspector

Azman who, after an initial denial, admitted Jaw's accusation. He begged Jaw and the appellant to forgive him and returned to Jaw the RM2,000. He promised Jaw not to harass him again and he promised the appellant that he would not conduct himself again as he had done. He pleaded to the appellant not to report the matter to the Seremban District Police Chief.

[68] The appellant attempted to see the Seremban District Police Chief that day and one or two days later to report about Inspector Azman, but failed, because that officer was not in his office. He then went to see Inspector Azman's chief, Deputy Superintendent Abdul Majid, to report the matter, but as he was about to state his report Inspector Azman came into DSP Abdul Majid's office to search for an investigation paper. Since after half an hour Inspector Azman was still there and the appellant was unable to wait any longer, the appellant left without reporting the matter. Since his leave was coming to an end, the appellant was unable to make further attempts to report about Inspector Azman to either of those two senior officers but instead, after making an appointment by telephone, he went to see an officer of the ACA and informed him of all that had happened. The ACA officer informed the appellant that the ACA had received a number of complaints about Inspector Azman and were observing his movements and would be taking action when necessary.

[69] That, according to the appellant in his written representation, was what happened at the time.

[70] According to the appellant in his evidence in the High Court, some months later he heard that Inspector Azman had been arrested by the ACA on a different complaint and that subsequently Inspector Azman was charged in the sessions court. The appellant said that the matter of Jaw's complaint came to the knowledge of the Disciplinary Section at Bukit Aman when they were investigating Inspector Azman's activities while his case in the sessions court was pending.

[71] On 15 January 1992, four years after the appellant confronted Inspector Azman, the Commission by letter notified the appellant that they had been informed that he had been irresponsible and that they proposed to punish him with reduction of rank. The charge against the appellant was stated to be one of being irresponsible in that on 28 December 1987 he failed to take any action against Inspector Azman for having received RM2,000 gratification from Jaw. They allowed the appellant 16 days within which to make a representation in writing.

[72] The appellant made his representation in a letter dated 5 February 1992, in which he related the events that I have set out. He contended that he could not be said to have failed to take any action against Inspector Azman and he gave his reasons, including the fact, as he claimed, that he had reported the matter to the ACA officer and the fact that the ACA had taken action

against Inspector Azman. He explained his reasons, which are not necessary to set out, for not making a formal police report against Inspector Azman. Hethen claimed that he had acted as he thought proper in the circumstances. He said that even if he had made a mistake, it was not a deliberate mistake but an error of judgement. He promised to be more careful in the future and he begged for sympathetic consideration.

[73] In spite of his representation and his past meritorious service and the several commendations and awards that he had received, the Commission decided to reduce the appellant's rank from Assistant Superintendent to Inspector. The Commission informed him of this by their secretary's letter of 11 September 1992 in which he stated that the decision was taken after considering the grounds as set out in the Commission's letter of 15 January 1992 and the appellant's reply in his letter dated 5 February 1992.

[74] In his oral submission in this appeal, one point raised by the appellant's counsel was that there had been procedural unfairness in the disciplinary process against the appellant because the charge against him was false and baseless. From the manner in which counsel developed his argument, it was obvious to me that what he meant by saying that the charge was false and baseless was that in the circumstances the appellant could not be said to have failed to take any action against Inspector Azman and, therefore, to have been irresponsible. It is, I think, a matter of perception, judgment or conclusion rather than one of falsity of charge. The Commission might not have believed the appellant's explanation of the action that he said he had taken or might not have been able to accept the efforts that the appellant said he had made as amounting to taking action against Inspector Azman. They might have had their own perception as to the proper action that the appellant should have taken against Inspector Azman and as to what was expected of a police officer of the rank of Assistant Superintendent in the circumstances. In failing to act as they might have considered he should have done, they might have concluded that he was irresponsible, and to them irresponsibility of that form might be serious enough to warrant a reduction in rank. Their perception that the appellant had failed to take any action against Inspector Azman and was therefore irresponsible and their decision that the proper punishment was a reduction in rank were matters of decision or judgement that are not for the court, sitting in judicial review, to judge. What is for the court to judge is the decision-making process. If the decision-making process was flawed, if, for example, in arriving at their decision as to guilt or punishment the Commission failed to follow the rules of natural justice, then the decision was bad.

[75] That brings me to the other point that was raised by the appellant's counsel in his oral submission. The point was that in arriving at their decision the Commission took into consideration the appellant's record of service and the recorded statements of two witnesses, which had not been made available to the appellant. As to the record of service, I agree with my learned brother,

Alauddin Mohd Sheriff FCJ, that the failure to make it available to the appellant did not prejudice him because the evidence is that what the Commission took into consideration from the record of service were the appellant's commendations. It is the statements of the two witnesses that have troubled my mind. There is no evidence of the contents of the statements. The appellant's counsel argued before us that if the statements had been made available to the appellant and he had replied to whatever in them that might have been prejudicial to him he might have done better with the Commission.

[76] The learned senior federal counsel replied to this point specifically in para 6 of his written submission. He first submitted that this point was not pleaded by the appellant. I think the point was pleaded generally in para 5 of the statement of claim, in which was included the complaint that the Commission did not give the appellant any reasonable facility to answer the allegation against him by supplying him with investigation papers, complaints or reports (pengaduan) and all relevant information. It was I think a formal pleading put in merely as a matter of strategy. The appellant could not specifically plead about the two statements because at that stage he did not know that the Commission had them. In para 5 of the statement of defence, the Commission denied the complaint and challenged the appellant to furnish proof of the allegation. The proof as regards the two statements came in the cross-examination of the respondent's sole witness, who revealed that the police had recorded two statements from witnesses which the Commission took into account when considering the case but which had not been furnished to the appellant.

[77] The senior federal counsel's next reply was that the witness was merely referring to the stage of finding the existence of a *prima facie* case under GO 26(2) of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980, at which stage the appropriate disciplinary authority, in this case the Commission, can consider 'all the available information'.

[78] Paragraph (2) of GO 'D' 26 says:

> (2) The appropriate disciplinary authority shall, after considering all the available information in its possession that there is a *prima facie* case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the legal department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself.

[79] In this case it was by their letter dated 15 January 1992 that the Commission called upon the appellant 'to state in writing … a representation …'. As far as this case is concerned, the sequel to para (2) is para (4), which says:

(4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate disciplinary authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

[80] It is clear from paras (2) and (4) that whatever information that was to be used against the appellant must be information that was in the possession of the Commission when they decided that there was a prima facie case and that the appellant's representation must be considered against that information and not against any other information that should come into the Commission's possession subsequent to the *prima facie* finding. It is not clear from the evidence of the respondents' witness, as recorded, whether the two statements existed and were considered at the prima facie stage or came into the possession of the Commission only when they were considering the appellant's representation. But even if, as the senior federal counsel contended, the two statements were considered at the *prima facie* stage, it does not make the case any the better for the Commission. Suppose the two statements contained information adverse to the appellant other than a mere allegation of failure to take action against Inspector Azman and that information influenced the Commission in their decision that there was a prima facie case of guilt and that the guilt merited a reduction in rank. In their letter dated 15 January 1992 the Commission did not reveal the information that they had. They merely said that they had been informed that the appellant had conducted himself irresponsibly and that for that reason they considered that the appellant should be reduced in rank and they then set out their ground (alasan) which was actually the charge of failing to take any action against Inspector Azman on 28 December 1987. The appellant then submitted his written representation, giving his account of the matter. Not knowing about the adverse information contained in the two statements, the appellant naturally did not rebut or explain it. The Commission, in considering and deciding on the appellant's representation, might therefore still be influenced by the adverse information in the two statements, on which the appellant had not had his say, notwithstanding all that the appellant had said in his written representation. It is therefore no answer to the complaint that the appellant had not been furnished with the two statements to say that it was only at the *prima facie* stage that the statements were taken into consideration.

[81] In support of his argument, the senior federal counsel cited two cases. He cited *Deputy Chief Police Officer, Perak v Ramesh a/l Thangaraju* [2001] 1 MLJ 161, saying that it was a case 'where the court held that the reading of the statement into the proceeding did not produce any procedural unfairness'. The proceedings in that case were an enquiry in which the police officer concerned was represented by a police officer. The senior federal counsel, however, omitted to mention the fact that the reading of the statement, which was the statement of a witness who had died, did not produce any procedural unfairness because the officer concerned had been given an opportunity to contradict it but did not choose to avail himself of the opportunity.

[82] The other case cited by the senior federal counsel is *Abdul Raub v Attorney-General* [1983] 1 MLJ 10. It was a Singapore case of disciplinary proceedings under the Police Force Act 1967 conducted by one ASP Francis Chan at which the officer concerned was present and was given a hearing. The senior federal counsel quoted what Wee Chong Jin CJ said but not the full passage. The full passage is as follows:

> Lastly, it was contended that the admission by ASP Francis Chan at the disciplinary proceedings before him of two written statements were in breach of reg 7(5) and (6) of the Police Regulations 1959 and that such breach rendered the proceedings a nullity and the dismissal null and void as being contrary to the rules of natural justice. We rejected this contention. The wrongful admission of a written statement as evidence is not, in our opinion, per se contrary to the principles of natural justice. In the present case the appellant had a fair hearing. He was dismissed after he had first been told what was alleged against him and hearing his defence or explanation. We were of the opinion that the written statements were properly admitted in evidence and there was no breach of the procedural provisions of the reg 7(5) and (6) of the Police Regulations 1959.

[83] It will be observed that the contention in that case that the admission of the written statements was contrary to the rules of natural justice was made on the basis that the statements were admitted in procedural breach of Police Regulations 1959, and not because the officer concerned was not made aware of the statements so as to be able to defend himself against them, and that in any case the learned Chief Justice found that there had been no procedural breach of the Police Regulations in the admission of the statements. The officer concerned, being present in the proceedings, would have been aware of the contents of the statements and would have had an opportunity to defend himself against them. In the present case the appellant was not aware of the statements which were considered by the Commission and was not afforded an opportunity to defend himself against them.

[84] The respondents have therefore failed to give a tenable answer to the appellant's submission regarding the Commission's failure to furnish him with the two witness statements.

[85] The learned trial judge in his judgement did not deal with the specific complaint about the two witness statements, although it was raised in submission by the appellant's counsel. He did, however, deal with the appellant's general complaint, which in the statement of claim was pleaded in para 5, of not being afforded with any reasonable facility to enable him to answer the charge. He dismissed the complaint. One reason that he gave for doing so was that there had been no request by the appellant for any facility. If that reason were to be applied specifically to the two witness statements, it would mean that to enable the appellant to rely on the ground of denial of right to be heard in regard to them, he must first have asked to be furnished with them. There are two difficulties with that proposition. First, in point of practicality, from the

Commission's letter dated 15 January 1992 the appellant could not have known that the Commission were in possession of the two witness statements. Second, the authorities cited by the learned senior federal counsel in his written submission in support of the proposition do not support it. In paragraph 4.4 he said that there is no duty to provide documents in the absence of a request. He then cited three cases.

[86] One of the three cases is *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487, a case of disciplinary proceedings under the Universiti Sains Malaysia (Discipline of Staff) Rules 1979. That, however, was a case where, as it happened, there was a request for certain information and documents some of which were refused, and not a case where there was no request. Nothing is laid down in that case as to what the law would be in a non-request situation. It does not lay down that a disciplinary authority is under no duty, in the absence of a request, to make available to the officer concerned information and evidence that has been or is going to be used against him.

[87] Another case is *Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor* [2002] 2 MLJ 131. That was a case where a police officer was dismissed by the Police Force Commission according to the same procedure as that adopted in this case, namely, after consideration of the written representation of the officer and without an oral hearing. This court held that there should have been an oral hearing and that without an oral hearing the officer had not been afforded a reasonable opportunity of being heard. One subsidiary reason why this court held that there should have been an oral hearing was that statements of witnesses and reports which had been circulated to members of the Commission for them to determine whether there was a prima facie case had not been supplied to the officer. The question whether the officer had requested for the statements and reports did not at all fall to be considered. That case not only does not support the Commission in this case on the question of the need for a request but leans in favour of the appellant.

[88] The last of the three cases is *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308, also, like the present case, a case of disciplinary action by the Police Force Commission where no oral hearing was held. The Commission gave to the officer concerned a letter of intention to institute disciplinary proceedings on the stated charges, the officer responded by letter, giving a full explanation, and requested for certain documents, which were supplied. The officer made a further written response, after which the Commission informed him by letter that after considering the disciplinary grounds as stated in their first letter, the officer's two replies, and other related information (lain-lain maklumat yang berkaitan), they had decided to impose the punishment of dismissal. The senior federal counsel, in relying on the case, merely referred to the fact that the officer requested for certain documents, but that was not an issue in the case and no judicial pronouncement was made on the question of requesting for

documents. The case was decided on the issue of the Commission's disclosure of having considered other information in arriving at their decision. It was not known what the other information was and the Commission did not choose to bring in evidence to explain it away and there was no evidence on record to show that the information had been furnished to the officer and he had been given an opportunity to comment upon it. For that reason this court ruled that the dismissal was void. The case, rather than supporting the Senior Federal Counsel's contention about the need to request for documents, in fact supports the appellant's case. There are three striking similarities between that case and this case. First, in that case as in this case the disclosure of the consideration of material that had not been made available to the officer came from the Commission themselves, in that case through their letter of decision, in this case through their sole witness. Second, in both cases the contents of the additional material and accordingly whether there was a risk of its having worked to the prejudice of the officer were not known to the court. Third, in that case the Commission did not choose to explain away the additional information or the mention of it, while in this case the Commission did not choose to show that the two witness statements bore no risk of having worked to the prejudice of the appellant. The Commission's witness was not asked in re-examination to disclose the contents of the two witness statements.

[89] As the appellant was not accorded the right to be heard as regards the two witness statements, his reduction in rank was invalid, and I would allow the appeal. In submission in the High Court, the appellant's counsel confirmed that the appellant ought only to be paid his salary, emoluments and other benefits that he should have enjoyed had he not been reduced in rank, for the period from his reduction in rank to the date of his retirement. I would order that an enquiry be held by the proper deputy registrar or senior assistant registrar to determine, on that basis, the amount to be paid to the appellant.

Rayuan ditolak dengan kos.

Dilaporkan oleh Loo Lai Mee